

This Opinion Is Not a
Precedent of the TTAB

Mailed: March 13, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Intimate Science

Serial No. 90123272

Daniel S. Kirshner of Daniel S. Kirshner, Attorney at Law, LLC.
for Intimate Science.

Michael FitzSimons, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

Before Wellington, Adlin and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Intimate Science (Applicant) seeks registration on the Principal Register of the mark ROSE PETALS (in standard character form) for “Dietary supplements in capsule form not containing rose petals as an ingredient” in International Class 5.¹

The Examining Attorney refused registration under Trademark Act Section 2(a), 15 U.S.C. § 1052(a), on the ground that the proposed mark is deceptive, and alternatively under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the ground that it is deceptively misdescriptive. After the Examining Attorney made the refusal final, Applicant appealed. Applicant and the Examining Attorney filed briefs.

We affirm both alternative refusals to register for the reasons below.

II. Deceptiveness

Trademark Act Section 2(a) bars registration of a mark that “consists of or comprises ... deceptive ... matter.” 15 U.S.C. § 1052(a). A deceptive mark cannot be registered on the Principal or Supplemental Register. 15 U.S.C. § 1091; *In re White Jasmine LLC*, 106 USPQ2d 1385, 1391 (TTAB 2013). We determine whether a mark is deceptive based on the description of goods. “Registrability of a mark is always considered in conjunction with the identified goods or services, for an applicant cannot obtain rights in a mark in the abstract, only in connection with specified goods or services.” *In re ALP of S. Beach Inc.*, 79 USPQ2d 1009, 1019 (TTAB 2006); *see also Roselux Chem. Inc. v. Parson’s Ammonia Co., Inc.*, 299 F.2d 855, 132 USPQ 627, 632

¹ Serial No. 90123272 was filed August 19, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s alleged bona fide intent to use the mark in commerce.

(CCPA 1962) (whether a term or mark is merely descriptive must be decided in relation to the goods for which registration is sought and the impact that it is likely to make on the average purchaser of those goods).

A proposed mark must be refused as deceptive if:

(1) it consists of or comprises a term that misdescribes the character, quality, function, composition, or use of the goods;

(2) prospective purchasers are likely to believe that the misdescription actually describes the goods; and

(3) the misdescription is likely to affect the purchasing decision of a significant or substantial portion of relevant consumers.

In re Budge Mfg. Co., 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988); *see also In re Tapco Int'l Corp.*, 122 USPQ2d 1369, 1371 (TTAB 2017); *cf. In re Miracle Tuesday, LLC*, 695 F.3d 1339, 104 USPQ2d 1330, 1334 (Fed. Cir. 2012) (the test for materiality incorporates a requirement that a significant portion of the relevant consumers be deceived).

A. Is ROSE PETALS a Misdescription of the Goods?

The Examining Attorney and Applicant both agree that this prong of the test is satisfied. As Applicant states in its Brief:

The applicant concedes that the examiner is correct in stating that the mark is misdescriptive. It is conceded that the mark contains the wording Rose Petals and that the goods to be sold under this mark do not actually contain rose petals as an ingredient. As such, the examiner has met

his burden to prove the first factor in both grounds for rejection.²

We agree. Applicant's identification reflects the misdescription.

B. Is the ROSE PETALS Misdescription Believable?

While the Examining Attorney contends that consumers would mistakenly believe that the goods contain rose petals, Applicant maintains that consumers would not take the reference literally.

The Examining Attorney submitted a variety of evidence to support the believability of supplements containing rose petals. One journal article in the record refers to the “[w]orldwide trend towards the use of natural plant remedies,”³ and the record includes evidence of consumer exposure to dietary supplements consisting of or containing rose petals.⁴ For example:

The Walmart website offers under the “Supplements” heading dried rose petals labelled as a “superfood” that can be used in tea and as “therapy.”⁵

The Athreya website promotes for sale “Organic Rose Petal Powder” described as “An Aromatic Ayurvedic Supplement for Promoting a Healthy Cardiac System and Emotional Balance.”⁶

² 4 TTABVUE 10.

³ December 7, 2020 Office Action at TSDR 2 (papers.ssrn.com).

⁴ While some evidence does not specifically refer to the “capsule form” identified by Applicant, because the evidence relates to dietary supplements, we consider it probative of consumer expectations regarding ingredients in dietary supplements generally.

⁵ December 21, 2021 Office Action at TSDR 14 (walmart.com).

⁶ July 7, 2021 Office Action at TSDR 2 (athreya herbs.com).

An Amazon webpage shows for sale a Rose Petal 500-gram “Herbal Supplement for Anxiety & Stress.”⁷

The Avena Botanicals site offers a Rose Petal Elixir herbal supplement.⁸

The Mariano’s website offers an “Essence of Pure Rose Petals Dietary Supplement.”⁹

The Nourish by WebMD site includes an article about rose petal tea, its health benefits, and its use in traditional Chinese medicine.¹⁰

The Mother Earth Living Website contains an article that touts the benefits of rose petals as an herbal medicine, including rose petal tea.¹¹

Applicant contends that this prong of the deceptiveness test is not satisfied because “rose petals conjure the image of decoration or romance.”¹² In support of this argument, Applicant submitted a screenshot of a page of Google search results for “rose petals.”¹³ According to Applicant, the “internet search ... shows that rose petals are most commonly used for decoration, for weddings, and the like.”¹⁴ However, a page of search engine hits for “rose petals” simply is not probative of the relevant inquiry because it fails to take account of the goods identified in the involved

⁷ July 7, 2021 Office Action at TSDR 6 (amazon.com).

⁸ July 7, 2021 Office Action at TSDR 7 (avenabotanicals.com).

⁹ December 21, 2021 Office Action at TSDR 2 (marianos.com).

¹⁰ December 21, 2021 Office Action at TSDR 8-13 (webmd.com).

¹¹ July 7, 2021 Office Action at TSDR 15 (motherearthliving.com).

¹² 4 TTABVUE 10 (Applicant’s Brief).

¹³ November 18, 2021 Response to Office Action at TSDR 2.

¹⁴ 4 TTABVUE 10 (Applicant’s Brief).

application.¹⁵ As noted above, we must consider the consumer perception in the context of the identified goods, and not in the abstract. *ALP of S. Beach*, 79 USPQ2d at 1019.

Here, the evidence shows that wording in the proposed mark “is a common supplement or ingredient in dietary supplements, [and] consumers will believe, based on the mark and the goods at issue, that applicant’s goods contain [it].” *In re E5 LLC*, 103 USPQ2d 1578, 1583 (TTAB 2012). Given consumer exposure to rose petal supplements as shown in the record, supplement consumers would take a reference to ROSE PETALS for supplements literally and believe that Applicant’s “ROSE PETALS” supplements contain that ingredient when, according to Applicant’s identification of goods, they do not. *See Budge*, 8 USPQ2d at 1261 (where goods of the type at issue “can be and are made from” the material at issue, this creates an inference that the second prong of the deceptiveness test is satisfied); *Tapco*, 122 USPQ2d at 1373 (evidence that “some adhesives are, in fact, clear and that this feature is touted to consumers” sufficient to satisfy burden that proposed mark KLEER ADHESIVES satisfied second element of *Budge* test).

C. Is the Misdescription Material to the Purchasing Decision?

We turn next to the third prong of the deceptiveness test, whether the misdescription is likely to affect the purchasing decision of a significant portion of

¹⁵ The Examining Attorney also correctly points out the more general, additional deficiency of search engine hit lists: the minimal surrounding text severely limits their probative value. *See, e.g. In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (agreeing that “the list of GOOGLE search result summaries is of lesser probative value than evidence that provides the context within which a term is used”).

relevant consumers. Thus, we assess whether prospective purchasers consider rose petals to be an appealing or desirable ingredient that would matter in selecting supplements. *See White Jasmine*, 106 USPQ2d at 1392 (citing *In re Juleigh Jeans Sportswear Inc.*, 24 USPQ2d 1694, 1698-99 (TTAB 1992)). According to the Examining Attorney, consumers desire rose petal as a supplement ingredient because of its perceived health benefits, rendering it material to the purchasing decision. *E5 LLC*, 103 USPQ2d at 1584 (materiality established based on “important and desirable health benefits” of copper as a supplement ingredient).

The Nourish by WebMD site contains a lengthy entry about the health and wellness benefits of rose petals and rose tea.¹⁶ Rose petals are described as “a good source of” Vitamin A, Vitamin C, Vitamin E, Iron and Calcium, and as “high in phytonutrients, plant compounds with antioxidant properties. Research shows that phytochemicals can help stop the formation of cancer cells and protect your body from cancer-like changes.”¹⁷ Rose tea is described as having “other potential health benefits” such as “Immune System Support,” “Lower[ing] Risk of Chronic Disease,” “Anti-Inflammatory Properties,” “Menstrual Cramp Relief,” and “Aid[ing] Digestion.”¹⁸ The site also points out its importance as a remedy in Traditional Chinese Medicine.¹⁹

¹⁶ December 21, 2021 Office Action at 8-13 (webmd.com).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 8-9; *see also* December 21, 2021 Office Action at TSDR 5 (livestrong.com) (“Ancient Chinese medicine used roses to treat digestive disorders, the pain from injuries and menstrual irregularities.”).

Examples of supporting evidence for materiality from other sources include:

An article in the Seattle Times discusses the nutritional benefits of edible flowers, and indicates that roses “contain vitamin C, a potent antioxidant nutrient.”²⁰

The Walmart website touts rose petals as a “Superfood,” noting that they contain “many enriching elements such as vitamins and antioxidants. They also have therapeutic benefits that can nourish the skin, increase immunity, reduce stress, and improve digestion.”²¹

The Athreya – Wellness Through Ayurveda website promotes its rose petal powder nutritional supplement as having a “nutrient-rich phytochemical content,” having numerous health benefits, such as promoting cardiac health, digestive health, healthy skin, and having “a calming and relaxing effect.”²²

The Avena Botanicals Rose Petal Elixir herbal supplement refers to its “medicinal properties,” noting that the supplement “relaxes the nervous system, eases feelings of impatience and agitation associated with PMS and menopause” and notes that roses “support the digestive system, cool emotional heat and inflammation related to women’s reproductive health, and fill the heart with harmony and peace.”²³

The Napiers Rose Petals Herbal Supplement is described as providing “[t]raditional support for Anxiety & Stress and Menstruation.”²⁴

Mariano’s website refers to rose petals as “an ideal essence for the skin.”²⁵

²⁰ December 7, 2020 Office Action at TSDR 9 (seattletimes.com).

²¹ December 21, 2021 Office Action at TSDR 14-15 (walmart.com).

²² July 7, 2021 Office Action at TSDR 2-5 (athreya herbs.com).

²³ July 7, 2021 Office Action at TSDR 7-8 (avenabotanicals.com).

²⁴ July 7, 2021 Office Action at TSDR 6 (amazon.com).

²⁵ December 21, 2021 Office Action at TSDR 2 (marianos.com).

The G. Baldwin & Co. site includes a post titled “5 Benefits of Rose Petals for Natural Health and Beauty – Inside Out Beauty” that touts its vitamin C for skin, antioxidants that can treat sore throats, ability to soothe stress, and ability to boost liver function.²⁶

The Mother Earth Living site discusses the use of roses in herbal medicine, noting that “Rose petals are mildly sedative, antiseptic, anti-inflammatory, and anti-parasitic. They’re also mild laxatives, a good supportive tonic for the heart, and great for lowering cholesterol (romantic, right?). Taken internally, their anti-inflammatory properties make them a wonderful treatment for sore throats or ulcers. They can stimulate the liver and increase appetite and circulation.... Rose can also lower your body temperature and help bring down a fever or cool you off in the summer. As an anti-spasmodic, it helps relieve spasms in the respiratory system (asthma and coughs), in the intestinal tract (cramping, constipation), and in the muscles (cramps and sports injuries). Adding its antiviral qualities, you’ve got an entire winter’s medicine chest in one herb. The benefits don’t stop there, however! Rose petals ... can help regulate and bring on delayed menstrual cycles.... They’re also a uterine tonic – healing cysts, infections, and bleeding. And, just like the essential oil, rose petals are a nervine; they help soothe and calm the nervous system, easing tension and pain.”²⁷

The record in its entirety convinces us that whether a supplement contains rose petals would be material to the purchasing decision of a significant portion of the relevant consumers. “[I]ndirect evidence of materiality is permitted, and an inference of materiality may be made....” *In re Les Halles de Paris J.V.*, 334 F.3d 1371, 67 USPQ2d 1539, 1542 (Fed. Cir. 2003) (discussing materiality in the context of Section

²⁶ July 7, 2021 Office Action at TSDR 11-14 (baldwins.co.uk). Although this appears to be a U.K.-based blog, it is in English and would be accessible to and likely to be encountered by U.S. consumers.

²⁷ July 7, 2021 Office Action at TSDR 15-16 (motherearthliving.com).

2(e)(3) geographic misdescriptiveness). The evidence shows that consumers are motivated to purchase dietary supplements containing rose petals in particular because they are deemed to have health benefits and serve as a medicinal remedy. The record strongly reflects the desirability, for health reasons, of rose petals, making the inference of materiality appropriate.

D. Conclusion as to Deceptiveness

Having determined that each of the three prongs of the deceptiveness test is met, we conclude that the refusal to register ROSE PETALS for Applicant's identified "dietary supplements in capsule form not containing rose petals as an ingredient" is appropriate and therefore affirm it.

III. Deceptive Misdescriptiveness

The refusal as deceptive under Section 2(a) absolutely bars registration, but for completeness, we briefly address the refusal based on deceptive misdescriptiveness. *White Jasmine*, 106 USPQ2d at 1394. The test for deceptive misdescriptiveness is identical to the first two prongs of the deceptiveness test -- in this case whether ROSE PETALS misdescribes the goods as identified, and whether consumers likely would believe the misdescription. *See id.* at 1395. For the reasons discussed in the deceptiveness analysis, both prongs of the test for deceptive misdescriptiveness are satisfied. We therefore affirm that refusal in the alternative.

Decision: The refusal to register Applicant's mark is affirmed.